United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

B P/S

ORIGINAL

75-7297

(42183)

To be argued by
ROSEMARY CARROLL

United States Court of Appeals

FOR THE SECOND CIRCUIT

PARENTS COMMITTEE OF PUBLIC SCHOOL, 19, et al.,

Plaintiffs-Appellees,

against

COMMUNITY SCHOOL BOARD OF COMMUNITY SCHOOL DISTRICT No. 14, BOARD OF EDUCATION OF THE CITY OF NEW YORK, and IRVING ANKER, as Chancellor,

Defendants-Appellants,

and

TERREL N. BELL, Commissioner of the United States Office of Education,

Defendant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

APPELLANTS' BRIEF

W. BERNARD RICHLAND,
Corporation Counsel,
Attorney for Appellants,
Municipal Building,
New York, N. Y. 10007.
566-3322 or 566-4337

L. KEVIN SHERIDAN,
LEONARD KOERNER,
MICHAEL S. CECERE,
ROSEMARY CARROLL,
of Counsel.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

United States Court of Appeals

FOR THE SECOND CIRCUIT

PARENTS COMMITTEE OF PUBLIC SCHOOL, 19, et al.,

Plaintiffs-Appellees,

against

COMMUNITY SCHOOL BOARD OF COMMUNITY SCHOOL DISTRICT NO. 14, BOARD OF EDUCATION OF THE CITY OF NEW YORK, and IRVING ANKER, as Chancellor,

Defendants-Appellants,

and

TERREL N. BELL, Commissioner of the United States Office of Education,

Defendant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

APPELLANTS' BRIEF

Statement

The municipal defendants appeal from an order of the United States District Court for the Eastern District of New York (WEINSTEIN, J.), entered May 19, 1975, which required the municipal defendants to conduct, within five days of the order, a "language assessment battery" in all non-public schools in Community School District 14, in Brooklyn. The order provided that its implementation

could be stayed if any parochial school affected moved for a stay of the Court's order (586).*

On May 23, 1975, representatives of the non-public schools, in an informal hearing in the District Court, objected to the administration of the language evaluation on the ground that it would disrupt the classes in the non-public schools. The Court then postponed the administration of the language assessment battery to September 30, 1975 (604-605).

We believe the Court's order of May 19 is appealable, as a grant of injunctive relief. 28 U.S.C. §1292(a). In the event that this order is not appealable, the municipal defendants request this Court to review the order of the District Court under the All Writs Act, 28 U.S.C. §1651, on the ground that the District Court exceeded its authority in requiring the municipal defendants to conduct a language assessment battery in non-public schools, which are not parties in this proceeding.

On May 27, this Court, with the consent of the appellants, denied a stay and ordered an expedited appeal.

Questions Presented

The plaintiffs, parents of children attending P.S. 19 in Community School District 14, commenced a civil rights action in May 1974 alleging that the split-session (short-time) instruction at P.S. 19 in District 14 violated their civil rights. In August 1974, the Court, after a hearing on an application for a preliminary injunction, entered an order requiring the defendants to provide compensatory education to the children at P.S. 19.

---

* Unless otherwise indicated numbers in parentheses refer to pages in the Joint Appendix.

In December 1974, the plaintiffs filed a supplemental complaint and a supplemental summons to add the United States Commissioner of Education. The complaint alleged that the 1974-75 Title VII grant for language handicapped children in public and non-public schools provided a disproportionate amount of funds to non-public school children in violation of 20 U.S.C. 880b et seq. The plaintiffs challenged the statistics as to enrollment and language disability of children in non-public schools which were accepted by the United States Department of Health Education and Welfare in connection with its approval of the federal grant. These statistics represent the results of a language data survey administered in both the public and non-public schools in the district.

The municipal defendants moved for summary judgment on March 10, 1975; the federal defendant on April 9, 1975. Upon the request of plaintiffs' counsel, the Court postponed the motions without date.

On April 18, 1975, the plaintiffs moved for discovery and made an oral application for the administration, in the district, of a language assessment battery for the purpose of determining the validity of the surveys submitted to HEW. This application was initially denied but was subsequently granted in May 1975. In an affidavit, the Director of the Office of Educational Evaluation of the Board of Education, stated that the cost of the language assessment battery would be approximately $116,000.

Without any hearing on the merits of the allegations in the supplemental complaint, the Court ordered the municipal defendants to conduct the language assessment battery in all non-public schools in District 14. The following questions are presented:

1. Is the Order of the District Court requiring the municipal defendants to conduct a language assessment battery appealable pursuant to 28 U.S.C. §1292(a), which section permits an appeal from an order of the district court granting a mandatory preliminary injunction?

2. If the order is appealable under 28 U.S.C. 1292, did the District Court abuse its discretion in requiring the City to test non-public school children at substantial cost to the municipal defendants, without holding a hearing on the merits of the plaintiffs' allegations in the supplemental complaint or making any findings which could be reviewed on appeal?

3. Assuming, arguendo, that this order is not appealable under 28 U.S.C. §1292(a), is the order of the District Court reviewable pursuant to the All Writs Act, 28 U.S.C. §1651, on the ground that the court exceeded its authority in requiring the municipal defendants, without considering the merit of plaintiffs' allegations, to conduct a language assessment battery, at a large cost, to aid the plaintiffs in the presentation of their case?

Facts

(1)

The plaintiffs, parents of children in attendance at P.S. 19, commenced an action against the municipal defendants on May 22, 1974, pursuant to 28 U.S.C. §1343(3) and (4) alleging that the maintenance of split-session (short-time) instruction at P.S. 19 in Community School District 14, Brooklyn, New York, violated their rights as secured by the United States Constitution, Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d and 42 U.S.C. §1983 (20).

On August 5, 1974, plaintiffs moved for a preliminary injunction (38). After a hearing, the Court on August 20, 1974, granted a preliminary injunction directing defendants to continue to maintain the split session instruction at P.S. 19, and, in order to mitigate the educational deprivation incidental thereto, to provide a program of remedial and compensatory education, including maximum feasible use of bilingual education, to children continuing on split session instruction at the school. The Court further directed that the entire sixth grade at P.S. 19 be transferred to JHS 50, while the remaining children on split session were not to be re-zoned to any other site (110-111). Additionally, defendants were to submit to the Court a plan for remedial and compensatory education (111). The defendants submitted a plan on September 17, 1974. That plan is presently being administered at P.S. 19.

(2)

At the time this injunction was entered, there was pending in the United States District Court for the Southern District of New York an action entitled *Aspira of New York* v. *Board of Education, Community School District 14, et al.*, 72 Civ. 4002, before Judge FRANKEL. This class action had been commenced on September 20, 1972, pursuant to 42 U.S.C. §1983, the First, Fifth, Ninth and Fourteenth Amendments to the United States Constitution and 42 U.S.C. §2000d. The complaint alleged that defendants' instruction of Spanish-dominant English language handicapped children in English effectively denied such children an equal educational opportunity. The complaint requested that the defendants be required to administer a program of bilingual education to all Spanish-dominant children throughout the New York City public

School system whose English language handicaps prevented them from effectively participating in the educational process (Compl., p. 21). The plaintiffs also requested that all language handicapped children be given special programs to compensate them for "defendants' past failure to provide plaintiff with an equal educational opportunity" (*id.*).

On August 29, 1974, a Consent Decree was approved by the District Court in the *Aspira* case. Pursuant to the decree, the defendants agreed to provide a program of bilingual education to all children in the New York City school system whose English language deficiencies prevent them from effectively participating in the learning process and who can more effectively participate in Spanish. This program is to be fully implemented by September 1975.

The plaintiffs and the defendants in *Aspira* agreed that the defendants would use a testing instrument called the language assessment battery (also referred to as L.A.B.) to determine which children in the public schools were language handicapped and in need of special bilingual educational services.

District 14 is a named defendant in the *Aspira* action and is required to provide bilingual services to all children in the public schools throughout the district, who are in need of such services, by September 1975.

(3)

Shortly after the decree was entered in *Aspira*, the attorney for the municipal defendants in the instant case informed the District Court of the *Aspira* case and the relief awarded the plaintiffs under the Consent Decree.

On December 6, 1974, plaintiffs moved to file a supplemental complaint, serve a supplemental summons and add Terrel H. Bell, Commissioner of the United States Office of Education, as a party defendant (118). This motion was granted on December 11, and the supplemental summons and complaint were served upon the municipal defendants on or about December 19 (189, 190). The supplemental complaint alleged that the defendants, in the 1974-1975 Title VII grant program for Community School District 14 had provided a disproportionate amount of funds to non-public school children in violation of 20 U.S.C. 880b, which section establishes the federal program under Title VII for the development of bilingual education (200, 208-214). 20 U.S.C. 880b, a part of the Elementary and Secondary Education Act in Title VII, provides funds for the development of demonstration (model) bilingual projects for language handicapped children in both the public and non-public schools. The Act is not intended to service all children who are eligible for the services but only provides funds to local educational agencies for development of experimental bilingual programs. These model programs are renewable every five years. 45 C.F.R. 123.14(b).

The municipal defendants answered the supplemental complaint on February 19, 1975, and moved for summary judgment on March 10, 1975 (224, 240). In support of the motion, the defendants set forth the details concerning the 1974-1975 grant and the prior history of the program, which began in 1970. In February 1974, the municipal defendants, in preparation for the submission of its grant application for the 1974-75 school year, conducted a language survey in both the public and those non-public schools seeking Title VII funds to determine the number of children in need of bilingual educational programs

(252). Thereafter, upon the request of the United States Office of Education (HEW), the district conducted an expanded language survey of all parochial schools in District 14 (250-251).

This survey revealed that of 11,095 children enrolled at the Hebrew Day Schools (grades K-12) 7,890 children were Yiddish-dominant English language handicapped and that of 6,911 children surveyed in the Roman Catholic parochial schools (grades K-8) 2,491 children were Spanish-dominant English language handicapped (244, 503, 507-508, 516-517).

A survey of the public schools showed that, of 26,254 children tested, 5,161 were moderately language handicapped and 2,498 were severely language handicapped (244).

The language survey used in the non-public schools was not identical to the survey used in the public schools (244). That is, a uniform test instrument was not employed, although the same techniques of testing were utilized (244).

The results of the surveys were incorporated into the application for the 1974-75 grant (244-245).

The United States Office of Education (HEW) approved District 14's Title VII grant application on June 26, 1974 in the amount of $486,231, and apportioned the funding to the participating schools taking into account the needs assessment provided by the District's language data surveys (243). Approximately $330,000 had been allocated for eligible children in the non-public schools and $150,000 was allocated to the children in the public schools (247).

At no time has the United States Office of Education objected to the language data survey figures setting forth the needs assessment of the public and non-public schools.

Title VII provides for five year demonstration projects (241). For the first four years of the Title VII program in District 14 funds were given to the public schools in the amount of $572,061 (1970-71—$157,322; 1971-72—$135,975; 1972-73—$150,000; 1973-74—$128,765) (455). There was no allocation of funds to the non-public schools for instructional services; a minimal allocation was made for staff development courses which included the public and non-public schools (242). Instructional services for non-public school children were provided for the first time in the 1974-75 school year, the fifth and final year of the program (242).

On April 15, 1975, the plaintiffs submitted opposing papers to the municipal defendants' motion for summary judgment and made a cross-motion for, inter alia, an order (399):

> "Pursuant to Rules 33 and 37 of the Federal Rules of Civil Procedure compelling the municipal defendants to administer immediately in School District #14 the language assessment battery developed by the defendants pursuant to the consent decree in *Aspira of the City of New York* v. *Board of Education, et al.*, 72 CIV 4002 (SDNY, August 29, 1974), to every child enrolled in the public and parochial schools located in District 14 to determine and assess the total number of children of limited English-speaking ability; * * *."

In support of plaintiffs' motion, Ira S. Bezoza, attorney for the plaintiffs, stated that the survey used by the municipal defendants to establish the number of language handicapped children in the non-public schools was not accurate (403). The affidavit of Mr. Bezoza also stated that the summary judgment motion should be denied be-

cause the members of the parents' advisory committee, established pursuant to the federal regulations promulgated under Title VII, were not representative of the affected children as required by the federal regulations (408-409).

The plaintiffs and the municipal defendants agreed to have the cross-motion returnable on May 9, 1975, the return date of the motion for summary judgment.

On April 18, 1975, the plaintiffs made an oral application for an order directing the municipal defendants to conduct the language assessment battery in all the non-public schools in District 14 (452-10). The Court did not rule on the application.

On April 22, 1975, the United States Commissioner of Education moved for summary judgment (453).

On May 9, 1975, the return date of both the municipal and federal defendants' motions for summary judgment, the Court adjourned both motions without date (530). The Court granted, without a hearing, plaintiffs' cross-motion for an order directing the municipal defendants to administer the *Aspira* language assessment battery in the non-public schools in District 14 (527).

On May 19, 1975, the municipal defendants applied for reconsideration of the court's decision of May 9, 1975 (547). In support of the application, Anthony J. Polemeni, Director of the Office of Educational Evaluation of the Board of Education, stated in affidavit, dated May 16, 1975, that the Court's order would require the language assessment battery to be given to 20,000 students (541). The affidavit provided a detailed breakdown of the various costs which, in the aggregate, totalled $116,000 (541). The affidavit noted that, in addition to the large cost of the tests, there would be "severe disruption of the edu-

cational system which would be caused in order to provide sufficient personnel to perform this massive job in the non-public schools" (543). In order to provide personnel for the testing, substitute teachers would have to be hired, or, if regular teachers were to be used, substitute teachers would be needed to cover the regular teachers' classes (*id.*).

The plaintiffs did not submit any evidence controverting the cost estimates in Mr. Polemeni's affidavit.

Without a finding that the language surveys administered by the District were invalid, or that the language assessment battery suggested by plaintiffs was a better predictor of language disability than the surveys previously conducted by the municipal defendants, the Court, on May 19, 1975, entered an order requiring the municipal defendants to conduct the language assessment battery. This test will be given to approximately 20,000 children attending non-public schools at 46 different locations throughout District 14 (304-305, 541).

On May 19, the date of the order appealed from, the 1974-75 Title VII grant funds remaining unspent were approximately $40,000 (293-294). The term of the Title VII grant for 1974-75 expires on June 30, 1975 (*id.*).

As of May 19, the Title VII grant application for 1975-76 was not before the District Court.* On May 23, the plaintiffs served on the defendants a second supplemental complaint challenging the Title VII grant for 1975-76 (589-596).

---

* On May 19, 1975, the District Court indicated that it would permit plaintiffs to further supplement their complaint within five days and bring the 1975-76 Title VII grant application before the Court (582-583).

Applicable Statutes and Regulations

28 U.S.C.

"§ 1651. Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction."

20 U.S.C.

"§ 880b. Congressional declaration of policy; authorization of appropriations

(a) Recognizing—

(1) that there are large numbers of children of limited English speaking ability;

(2) that many of such children have a cultural heritage which differs from that of English-speaking persons;

(3) that a primary means by which a child learn's is through the use of such child's language and cultural heritage;

(4) that, therefore, large numbers of children of limited English-speaking ability have educational needs which can be met by the use of bilingual educational methods and techniques; and

(5) that, in addition, children of limited English-speaking ability benefit through the fullest utilization of multiple language and cultural resources,

the Congress declares it to be the policy of the United States, in order to establish equal educational opportunity for all children (A) to encourage the establishment and operation, where appropriate, of educational programs using bilingual educational practices, techniques, and methods, and (B) for that purpose, to provide financial assistance to local educational agencies, and to State educational agencies for certain purposes, in order to enable such local educational agencies to develop and carry out such programs in elementary and secondary schools, including activities at the preschool level, which are designed to meet the educational needs of such children; and to demonstrate effective ways of providing, for children of limited English-speaking ability, instruction designed to enable them, while using their native language, to achieve competence in the English language."

* * *

880b-7.

* * *

"(b)(1) A grant may be made under this section only upon application therefor by one or more local educational agencies or by an institution of higher education, including a junior or community college, applying jointly with one or more local educational agencies (or, in the case of a training activity described in clause (3)(A) of subsection (a) of this section, by eligible applicants as defined in section 880b-9 of this title). Each such application shall be made to the Commissioner at such time, in such manner, and containing such information as the Commissioner deems necessary, and

(A) include a description of the activities set forth in one or more of the clauses of subsection (a)

of this section which the applicant desires to carry out; and

(B) provide evidence that the activities so described will make substantial progress toward making programs of bilingual education available to the children having need thereof in the area served by the applicant.

(2) An application for a grant under this part may be approved only if—

(A) the provision of assistance proposed in the application is consistent with criteria established by the Commissioner, after consultation with the State educational agency, for the purpose of achieving an equitable distribution of assistance under this part within the State in which the applicant is located, which criteria shall be developed by his taking into consideration (i) the geographic distribution of children of limited English-speaking ability, (ii) the relative need of persons in different geographic areas within the State for the kinds of services and activities described in subsection (a) of this section, (iii) with respect to grants to carry out programs described in clauses (1) and (2) of subsection (a) of this section, the relative ability of particular local educational agencies within the State to provide such services and activities, and (iv) with respect to such grants, the relative numbers of persons from low-income families sought to be benefited by such programs; * * *."

45 C.F.R.

"§ 123.01 Purpose.

Assistance made available under this part shall be for the purpose of developing and carrying out new

and imaginative elementary and secondary school programs designed to meet the special educational needs of children of limited English-speaking ability.

§ 123.02 Definitions.

Except as otherwise specified, the following definitions shall apply to the terms used in this part:

'Bilingual education' means the use of two languages, one of which is English, as media of instruction.

'Children of limited English-speaking ability' means children who come from environments where the dominant language is other than English.

'Dominant language' means the language most relied upon for communication in the home."

* * *

"§ 123.14 Criteria for assistance.

(a) In approving applications submitted by local educational agencies (or by such agencies applying jointly with institutions of higher education), the Commissioner shall apply the following criteria:

(1) Objective criteria. (60 points) The need for such assistance, as indicated by the number and percentage of children of limited English-speaking ability between the ages of 3 and 18, inclusive, residing in the school district served by the applicant agency; and

(2) Educational and programmatic criteria. (140 points) The extent to which the proposed program promises to increase the educational opportunities of children of limited English-speaking ability in the school district served by the applicant agency, as indicated by the following:

(i) Needs assessment. (20 points) The extent to which the applicant has identified and demonstrated by objective evidence the nature and magnitude of the educational needs to be addressed by the proposed program, and the extent of the needs so identified;

(ii) Statement of objectives (10 points) The extent to which the application sets forth objectives in relation to the needs assessed which are interrelated specific measurable, and realistically attainable within the specified periods;

(iii) Activities. (30 points) (a) The extent to which the activities included in the proposed program promise to result in the attainment of the applicant's stated objectives, and (b) in the case of an applicant which received assistance under this part during the fiscal year, prior to the fiscal year for which assistance is sought, the extent to which the applicant demonstrates, by evaluation reports and other objective evidence, that any program proposed to be continued has made substantial progress in meeting the special educational needs of children of limited English-speaking ability;

(iv) Staffing (15 points) The extent to which the application (a) sets forth an adequate staffing plan which includes provisions for making maximum use of present staff capabilities, and (b) provides for continuing training of professional and paraprofessional staff which promises to increase the effectiveness of the proposed program;

(v) Use of educational resources. (5 points) The extent to which the applicant proposes to

utilize the expertise and cultural and educational resources described in § 123.13 (b) (7);

(vi) Parent and community involvement. (20 points) The extent to which the application (a) delineates specific opportunities for the participation of the community advisory group described in § 123.16 in the planning, implementation, and evaluation of the proposed program, and (b) includes evidence that such participation has been encouraged and has in fact occurred;

(vii) Delivery of services. (5 points) The extent to which the application sets forth (a) a plan for meeting the logistical requirements of the proposed activities, including a description of adequate and conveniently available facilities and equipment, (b) a statement of methods of administration likely to ensure the proper and efficient operation of the proposed program, and (c) a statement of fiscal control and fund accounting procedures likely to ensure the proper disbursement of and accounting for funds made available under this part;

(viii) Resource management. (5 points) The extent to which the application contains evidence that (a) the costs of program components are reasonable in relation to the expected benefits; (b) the proposed program will be coordinated with existing efforts; and (c) all possible efforts have been made to minimize the amount of funds requested for purchase of equipment necessary for implementation of the proposed program;

(ix) Evaluation. (15 points) The extent to which the application sets forth a format for ob-

jective, quantifiable measurement of the success of the proposed program in attaining the stated objectives, including (a) a statement of the criteria by which attainment of objectives is to be measured; (b) a description of the instruments to be used to collect data for evaluation of the proposed program (and the method to be used to validate such instruments where necessary), or a description of the procedure to be employed in selecting such instruments; (c) an assessment of the validity of such instruments when used to evaluate the language skills, academic achievement, academic aptitude, or general intelligence of children whose dominant language is other than English; (d) a timetable for the collection of data for evaluation, and a description of the method to be used to review the program in light of such data; and (e) provisions for comparison of evaluation results with norms, control group performance, results of other programs, or other external standards;

(x) Dissemination. (5 points) The extent to which the application sets forth provisions for disseminating the results of the proposed program and making materials, techniques, and other outputs resulting therefrom available to persons residing in the school district served by the applicant local educational agency, the general public, and those concerned with the educational opportunities of children of limited English-speaking ability; and

(xi) Continuation of program. (10 points) The extent to which the proposed program is designed in such a manner as to facilitate the continuation

of such program as part of the regular school program of the applicant local educational agency upon the unavailability of assistance under this part."

* * *

"§ 123.15 Participation of children enrolled in private schools.

(a) Applications submitted under this part shall contain an assurance that, to the extent consistent with the number of children of limited English-speaking ability enrolled in nonprofit private schools in the area to be served, provision has been made for participation of such children in the proposed program, and a description of the provisions which have been made for such participation. Such provisions shall assure that the special educational needs of such children are addressed to the same extent as the special educational needs of children of limited English-speaking ability enrolled in the schools of the applicant local educational agency."

POINT I

The order of the District Court requiring the municipal defendants to conduct a language assessment battery to 20,000 students in 46 non-public schools at an estimated cost of $116,000 is not a discovery order. That order does not require the defendants to produce witnesses or documents but instead requires the defendants to manufacture evidence to help the plaintiffs prove their claims without the Court, prior to the entry of this order, holding a hearing or making any determination as to the merits of the plaintiffs' claims. This order is a partial determination on the merits in favor of the plaintiffs and is a mandatory preliminary injunction appealable under 28 USC §1292.

Since the District Court did not hold a hearing or make the required findings prior to the entry of the order, the order should be reversed.

(1)

It is well established that a discovery order compelling testimony or the production of documents or things is not an order granting an injunction and is not appealable under 28 U.S.C. 1292(a)(1). See *Alexander* v. *United States*, 201 U.S. 117, 121-122 (1906); *Pauls* v. *Secretary of Air Force*, 457 F. 2d 294, 298 (1st Cir., 1972); *Bova* v. *United States*, 460 F. 2d 404, 406 (2d Cir., 1972); *Gialde* v. *Time, Inc.*, 480 F. 2d 1295, 1300 (3rd Cir., 1973).

The order in the instant case requiring the municipal defendants to conduct a language assessment battery to 20,000 pupils in 46 schools at an estimated cost of $116,000 is not a discovery order. Rules 26-37 of the Federal Rules of Civil Procedure establish the scope of pre-trial discovery

in a civil action, such as the instant case. The Rules permit a party to have discovery of testimony, inspection of documentary evidence and other tangible things and the examination of property and persons if necessary. The discovery rules assume that the material sought by discovery is in existence and is in the possession of the person who is subject to the discovery order.

The order in the instant case did not require the municipal defendants to produce material already in existence. It required them to manufacture evidence at their own expense to aid the plaintiffs' case without any prior determination by the Court as to the plaintiffs' probability of success in obtaining the relief sought in the complaint.

The material submitted to the Court prior to the entry of the order does not demonstrate that plaintiffs will probably succeed in the case entitling them to a remedy substantial enough to justify the estimated $116,000 expense of the language assessment battery. The program challenged by the plaintiffs has been in existence since 1970. The program was a model project which was to be renewed after five years. For the first four years of the program all the Title VII funds were given to non-public schools. In the fifth and final year of the program (1974-1975), the non-public schools received Title VII funds for the first time. The first supplemental complaint challenged the allocation of Title VII funds only for 1974-1975. Although the non-public schools received a greater amount of Title VII funds for 1974-1975 than was received by the public schools, the public schools, with respect to the total amount of funds over the five year period, received $432,061 more than was received by the private schools.

Even if the allegations in the supplemental complaint could be considered with respect to the 1974-1975 year,

without considering Title VII aid to the public schools in the prior four years, the language assessment battery would not be justified. At the time the Court ordered the tests, on May 19, 1975, approximately $40,000 of Title VII funds was unexpended on that date. The District Court subsequently postponed the language assessment battery to September 30, 1975. The Title VII funds will have been completely expended by June 30, 1975. The District Court attempted to justify its order of May 19 by suggesting to the plaintiffs that they file a second supplemental complaint challenging the municipal defendants' application for Title VII funds for the 1975-1976 school year. The plaintiffs filed a second supplemental complaint on May 23, 1975. The cause of action alleged in the second supplemental complaint does not warrant the administration of the language assessment battery to the non-public schools. Even if the plaintiffs proved the allegations in the second supplemental complaint, they would be entitled to no other relief than has already been granted them in the *Aspira* case.

Pursuant to the consent decree in *Aspira*, the municipal defendants are required, by September 1975, to provide bilingual educational services to every child in the public school system in the City of New York who is found to be in need of such services. The testing instrument to determine the children in the public schools who need such services is the language assessment battery, the very test that the plaintiffs urged should be used in the instant case. As a result of *Aspira*, the only entities affected by the allocation of the funds from the Title VII grants are the non-public schools, who are not covered by the *Aspira* decree, and the municipal defendants who can use the grant as a source of revenue to help defray the cost of providing the services required by the *Aspira* decree.

Apart from the failure of the plaintiffs to show their entitlement to a remedy significant enough to warrant the large cost of this test, the plaintiffs have not shown that the language surveys used by the municipal defendants to determine the number of language handicapped children in public and non-public schools were not accurate. Title VII and the Rules and Regulations do not require a specific testing procedure. See 20 U.S.C. 880b et seq.; 45 C.F.R. 123 et seq. The results of the language surveys for the 1974-1975, as well as the prior 4 years, were accepted by HEW. In the absence of any contrary showing by the plaintiffs, there is no reason to assume the surveys are inaccurate. In addition, the plaintiffs made no showing that the language assessment battery is a more accurate predictor of a child's language handicap than the surveys used by the municipal appellants.

Moreover, the criteria for assistance established by the United States Office of Education is based on a point system. The total amount of possible points is 200. See 45 C.F.R. 123.14, quoted in full *supra*, pp. 15-19. The needs assessments submitted by an applicant amounts to only 20 points. In comparison, the bilingual activities suggested by the applicant is worth 30 points. Consequently, even if the surveys used by the municipal appellants are not the best methods of determining childrens' language handicaps, the municipal appellants could still be eligible for the Title VII grants because they have accumulated sufficient points by satisfying the other criteria in the federal regulations.

Section 1292 (a)(1) has been interpreted by this Court "as relating to injunctions which give or act in giving some of all of the substantive relief sought by the complaint . . . and not as including restraints or direction in orders con-

cerning the conduct of parties or their counsel, unrelated to the substantive issues in the action, while awaiting trial." *International Products Corp.* v. *Koons*, 325 F. 2d 403, 406 (2d Cir., 1963). See also, *Ronson Corporation* v. *Liquifin Aktiengesellschaft*, 508 F. 2d 399, 401 (2d Cir., 1974); *Weight Watchers of Phila., Inc.* v. *Weight Watchers Int.*, 455 F. 2d 770, 774 (2d Cir., 1972); *Semmes Motors, Inc.* v. *Ford Motor Comp.*, 429 F. 2d 1197 (2d Cir., 1970).

As we noted above, the plaintiffs, to prevail on the cause of action challenging the allocation of Title VII funds for the 1975-1976 year, will have to show that (1) an inadequate needs assessment would violate the applicable federal statutes and rules and regulations (2) the surveys used by the municipal appellants were not accurate in determining the number of language handicapped children in the public and non-public schools and (3) the language assessment battery is a more accurate testing instrument to determine language handicapped children than the surveys used by the municipal appellants. Only after the plaintiffs, through testimony and documentary evidence, have proven these three elements of their cause of action would they be entitled to an order from the Court directing the municipal appellants to administer the language assessment battery in the non-public schools in the district. The order of the court requiring such a test was a partial determination on the merits in favor of the plaintiff and is a preliminary injunction appealable under 28 U.S.C. 1292 (a)(1).

Since the District Court did not hold a hearing or make findings before issuing the preliminary injunction order, the order of the Court should be reversed. *Hart* v. *Community School Board of Brooklyn*, 487 F. 2d 223, 224 (2d Cir., 1973); Federal Rules of Civil Procedure 52a.*

---

* The Court, in its only comments on the merits of the allegations in the plaintiffs supplemental complaint, stated that the

(2)

In an affidavit, dated May 20, 1975, in opposition to the municipal defendants' application to this Court for a stay pending appeal, Kenneth Kimerling, attorney for the plaintiffs, stated that the estimated cost of $116,000 for the administration of the language assessment battery to non-public schools computed by Anthony Polemeni in an affidavit, dated May 18, 1975, was excessive. Mr. Kimerling, without submitting any evidence to support his assertions, stated that the number of children who have to take this exam is 4,500, not 20,000, there were no printing costs to be incurred and there would be no expense in the administration of the tests because the exams could be given by the non-public school teachers (Affid., pp. 13-14) Mr. Kimerling gave no reasons to warrant these conclusions. Plaintiffs' attorneys made similar objections without submitting any evidence to the District Court (569-572).

It would appear that Mr. Kimerling was suggesting that the number of students to be given the language assessment battery could be limited by excluding high school students in the non-public schools (552). Such an exclusion is not mentioned in the court order appealed from and is incomprehensible since high school students are eligible for aid under the Title VII program. 45 C.F.R. 123.13(a)1. The suggestion that the language assessment battery booklets and the scoring sheets in the possession of the public schools be used by the private schools is without merit. The books are to be permanently retained by each of the public schools to fulfill the requirements of the *Aspira* de-

---

plaintiffs, for the 1975-1976 year had not come forward with any material to indicate that the application is invalid and for 1974-1975 the court noted that the year "for all practical purposes, is over" (531-532).

cree. The suggestion that the municipal defendants use the non-public school teachers also is also without merit. There is no reason to assume that the non-public schools, at their expense, will administer a language assessment battery which the court has already indicated must be administered by the municipal defendants. It should be noted that the plaintiffs in the District Court did not offer any evidence to refute the cost analysis prepared by Mr. Polemeni in his affidavit.

In his affidavit in opposition to the municipal defendants' application for a stay, Mr. Kimerling, citing 4A MOORES' *Federal Practice* § 33.20 (1974 ed.), stated that the type of discovery order where parties are directed to compile information is not extraordinary and within the discretion of the Court. That section discusses the use of interrogatories which require the party on whom the interrogatories are served to compile data based on an analysis of their *own* records. That section does not support an order that requires a party to manufacture evidence for the plaintiff by administering a language assessment battery to non-public schools in an entire district, which schools are not parties to the litigation and are not under the control of the municipal appellants.

POINT II

Assuming, arguendo, that the order of the District Court is not appealable under 28 U.S.C. §1292(a), the order of the District Court requiring the municipal defendants to administer the language assessment battery to children in non-public schools is reviewable under the All Writs Act, 28 U.S.C. §1651. The Court plainly exceeded its authority where such an order is not permitted under the Federal Rules of Civil Procedure, there has been no hearing or findings made with respect to the merits of the action, there has been no showing that the original language survey was invalid and there has been no showing that the test ordered by the District Court is required by the provisions of Title VII, the applicable federal regulations or by the United States Office of Education.

(1)

Assuming, arguendo, that the District Court order is not appealable as a preliminary injunction order, the order is reviewable under 28 U.S.C. § 1651. Although we have not filed a petition for a writ of mandamus, we served the papers in support of our application to this Court for a stay of the order pending the disposition of the appeal on Judge WEINSTEIN. In our papers, we stated that we were seeking review of his order under 28 U.S.C. §1651. If this Court determines that the order is not appealable under § 1292(a), it is appropriate for this Court to treat this appeal and the papers submitted on the municipal appellants' application for a stay as an application for a writ of mandamus. *International Products* v. *Koons*, 325 F. 2d 403, 407 (2d Cir., 1963).

It is not disputed that an application to an appellate court for a writ of mandamus against a district court judge will generally be denied where the judge had the power to issue the order challenged under 28 U.S.C. § 1651. See *United States* v. *Di Stefano*, 464 F. 2d 845, 850 (2d Cir., 1972); *American Express Warehousing, Ltd.* v. *Transamerica Ins. Co.*, 380 F. 2d 277, 283 (2d Cir., 1967). Where the district court does not have the authority to issue an order, the appellate court will issue a writ prohibiting the court from enforcing the order. See *International Products Corp.* v. *Koons*, 325 F. 2d 403 (2d Cir., 1963). See also, *Schlagenhauf* v. *Holder*, 379 U.S. 104 (1964); *Winters* v. *Travia*, 495 F. 2d 839 (2d Cir., 1974).

In *International Products* v. *Koons*, the district court entered an order sealing a deposition of the president of the plaintiff company because the questions asked concerned payments made by officers of the company to officials of a South American government. The order also enjoined defendants and others from publishing or disclosing to third parties any of the testimony or documents or writings referred to in the deposition. This Court found that the portion of the order which sealed the deposition was authorized by Rule 30 of the Federal Rule of Civil Procedure. 325 F. 2d at p. 403. This Court also found that the portion of the order that curtailed disclosure of information and writings, which defendants and their counsel possessed before the deposition was taken, was not authorized by any Rule of the Federal Rules of Civil Procedure. The Court stated that, while this portion of the order was reviewable in a mandamus proceeding, the court would give an expression of its views instead of waiting for the lower court judge to receive a formal petition and request to be heard. 325 F. 2d at p. 407. It concluded its opinion suggesting "that the District Court modify its order so

as to make it plain that no restrictions are imposed on the freedom of the persons named therein to make whatever use they wish of writings * * * or information which have come into their possession otherwise than through the court's processes." 325 F. 2d at p. 409.

In *Winters* v. *Travia*, 495 F. 2d 839 (2d Cir., 1974), the plaintiff, a Christian Scientist, had commenced an action to recover damages for injuries sustained as a result of forced medication administered to her in a hospital. The District Court ordered the plaintiff to undergo a physical and mental examination. The plaintiff filed a petition for writ of mandamus seeking to prohibit the enforcement of the District Court's order on the ground that she was willing to abandon any claim that "that any present or anticipated physical or mental disability or condition was caused by the 1968 treatment on which her case is based." 495 F. 2d at p. 841. This Court issued the writ on the ground that Rule 35 of the Federal Rules of Civil Procedure permits a physical or mental examination only when the condition of the party examined is in controversy and the plaintiff had chosen not to place her condition in controversy.

In the instant case, the District Court did not have the authority to issue an order requiring the defendants to manufacture evidence to aid the plaintiff by administering a language assessment battery to children in the nonpublic schools, which schools are not parties to this action, and are not under the control of the municipal defendants. As we noted above *ante*, pp. 20-21, the federal rules permitting discovery do not authorize the order in the instant case. Although discovery rules are to be liberally construed, this Court has reversed a discovery order which was not authorized by the applicable rules. See *United States* v. *Percevault*, 490 F. 2d 126 (2d Cir., 1974).

In the absence of any authorization under the federal discovery rules, the Court exceeded its authority in issuing the order appealed from where there has been no hearing to review the merits of the plaintiff's case, there has been no showing that the original language was invalid and there has been no showing that the test ordered by the court is required by the provisions of Title VII, the applicable federal regulations or by the United States Office of Education.

This order establishes a most unfortunate precedent. The plaintiffs without any review of the merits of their case have shifted the burden of proving their case to the municipal defendants, who are required to manufacture evidence at a very large cost.

The predicament of the defendants is made worse because of the circumstances of this case. As we pointed out in POINT I *ante*, pp. 21-23, the cost of the language assessment battery will probably exceed the amount of the relief awarded to the plaintiffs in this case even in the unlikely event they are successful in this litigation.

CONCLUSION

The order appealed from should be reversed, with costs. In the event that the order is not appealable, a writ of mandamus should be issued by this Court directing the District Court to vacate the order.

June 19, 1975.

Respectfully submitted,

W. BERNARD RICHLAND,
Corporation Counsel,
Attorney for Appellants.

L. KEVIN SHERIDAN,
LEONARD KOERNER,
MICHAEL S. CECERE,
ROSEMARY CARROLL,
of Counsel.

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

Joel Epstein

duly sworn, says that on the 19 day of June 19 75

260 B'way in the Borough of B'klyn in New York City, he served 3 copy(s)

appellants Brief upon Ira B. Benzoza, Patricia Vergata Esq's

Williamsburg Legal Services in the within entitled action, by delivering

of the same to a person in charge of said Attorney's office, and leaving the same with him.

Sworn to before me, this 19

day of June 1975

Joel Epstein

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

Joel Epstein

duly sworn, says that on the 19 day of June 19 75

95 Madison Ave in the Borough of Mon in New York City, he served 3 copy(s)

appellants Brief upon Kenneth Kimmerling & Herbert Jacobson Esq's

Puerto Rican Legal Defense Fund in the within entitled action, by delivering

of the same to a person in charge of said Attorney's office, and leaving the same with him.

Sworn to before me, this 19

day of June 1975

Joel Epstein

Notary Public, State of New York
No. 03-4512100
Qualified in Kings County
Commission Expires March 30, 1976